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THE INFLUENCE OF STATE POLITICS IN EXPANDING FEDERAL POWER

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In discussing this subject it will be necessary to refer to democratic principles of government. Unless it is understood distinctly just what is meant the statements made will not convey clear ideas. There are two senses in which the word democratic is used—one having respect primarily to means and the other to ends. From the one point of view, all institutions that pretend to put power in the hands of the people are democratic in their character. An instance of this assumption appears in last year's programme of this association, wherein the direct primary, the initiative, the referendum, and the recall are designated as "the newer institutional forms of democracy." From the other point of view, the quality of institutions is not decided by the emotions and intentions with which they are created, but is to be discerned from their results, so that the democratic value of any institution is wholly contingent upon its usefulness in subjecting the operations of government to the control of the people. From this point of view, the classification quoted from last year's programme begs the very question that is to be determined.

Each of these attitudes of thought has an appropriate background of political theory and historical doctrine. According to the one, the ideal form of government is a pure democracy, in which all the people are equal in political status and function, they themselves managing the public business and directing all public agency. The problem of democracy in these times is, therefore, to find means of approximating as closely to this ideal as is possible under modern social and industrial conditions. The direct primary, the initiative, the referendum and the recall, are hailed as institutions supplying such means. This attitude of thought is favored by the historical doctrine which derives free institutions from Teutonic primitive polity. According to an eminent American exponent of this

doctrine, Mr. Hannis Taylor, it is possible "to trace the mighty stream of Teutonic democracy from its sources in the village-moots and state assemblies of Friesland and Sleswick across the Northern Ocean into Britain, and across the Atlantic into North America."¹

It is held by others that in view of what is known of the descent of man and of the laws of political development, no such state as that described as pure democracy could exist, and that, as a matter of fact, there is not an instance of it to be found in all history. It is as much a romantic fiction as Rousseau's state of nature and is, indeed, a variant of that illusion. Democracy implies equality of political status, but in a state of freedom there can not be identity of function among the units of any community. The notion that Teutonic primitive polity has been the source of modern free institutions is antagonized by critics who adduce evidence to show that it is destitute of historical foundation. Such writers as Boutmy, Sidgwick, and Maitland attribute English constitutional government to historical accidents, the most potent of which was the vigor of royal authority, causing representative institutions to be fostered from their convenience in enabling the monarch to reach and use his people for national advantage. In his "Development of European Polity" Professor Sidgwick contends that the great Teutonic contribution to political development was the erection of kingship into a firm and stable institution. In tracing the rise of modern free institutions he finds that the basis was supplied by the unity and order established through the predominance of monarchy. Professor Maitland, approaching the subject from the standpoint of jurisprudence, expressed similar views. Political organs now serving as essential means of popular control were originally offshoots from royal prerogative. Crown authority is the basis of democratic rule. In the course of lectures recently published under the title of "Constitutional History of England," Professor Maitland declared that "we must not confound the truth that the king's personal will has come to count for less and less, with the falsehood . . . that his legal powers have been diminished. On the contrary, of late years they have enormously increased."²

From this point of view, democracy, instead of being a primitive and simple form of government, is an advanced and elaborate form

¹ *Origin and Growth of the English Constitution*, Preface to part 1, p. x.

² P. 399.

of government, the product of a long course of political evolution. Democratic impulse is the concomitant of the extension of the area of public consciousness, a process always traceable to historic causes. With the increase of popular interest in public affairs it is a natural consequence that there should be a demand for means of subjecting the management of public affairs to the control of public opinion. But it does not follow that democratic impulse will obtain satisfaction in the form of government that ensues. That will depend altogether on success in developing appropriate political structure arranged in stable institutions. Without such institutions democratic tendencies are perverted, and in all ages the outcome has been the correlated growth of oligarchy and ochlocracy, until necessities of public order introduce dictatorship. Historically, this cycle of change has been so regular that the very name of republic was long odious as indicating a state in which the weak were the prey of the strong. This prepossession deeply colored English political literature during the eighteenth century. A powerful expression of it is contained in the nineteenth chapter of Goldsmith's "Vicar of Wakefield," wherein the republics of Holland, Genoa and Venice are mentioned as types of polity in which "the laws govern the poor and the rich govern the laws." Even in our own time there are thinkers who insist that institutional decay and social disorder are the normal outcome of democracy. Bismarck, unconsciously reiterating an opinion anciently expressed by Polybius, held that there is a natural tendency in politics to move in a vicious circle from absolutism to anarchy and back again. Nietzsche declared that democracy is a decaying type of the state. According to this theory, popular government is but a transient episode in the life of a nation. If liberty and order seem to be for a time tolerably secure under it that is due to habits and faculties instilled by race experience under regal discipline, but which gradually relax when that discipline is removed, until increasing disorder compels resort to dictatorship. Historians who adopt this theory, do not deny that democratic periods may be attended by brilliant displays of art and culture as in ancient Athens and mediæval Florence, but they hold that such outbursts of human capacity are to be attributed to previous storage of power in the character of the people by coercive authority. As the historian, Froude, puts the case, "democracy is the flowering of the aloe," referring to the way in which the century plant suddenly puts forth its grand flower after long preparation.

While evidence can hardly be adduced, I am under the impression that our own politicians, if they seriously consider the matter at all, incline to this attitude of thought. Cynicism is prevalent among party managers in their table talk. As a relief from the obsequiousness they practice in public they seem to take pleasure in sarcastic and humorous comment upon the greed and foolishness of the "peepul." Contempt of the people by the politicians who use them is, however, an ancient trait. Cicero, the silver-tongued orator of his day, in one of the essays he composed for circulation in his own set remarked: "Can anything be more foolish than to think that those you despise single can be other when joined together?"

In support of the doctrine that democracy is inherently unstable and transitory, the weighty opinion of the Fathers may be cited. Evidence of the profound distrust and aversion with which they regarded democracy abounds in the reports preserved of the debates in the constitutional convention and in the exposition of their views contained in *The Federalist*. In view of the evidence before them the conclusions they reached were inevitable. Everything that history had then to say on the subject was to the effect that while democratic tendencies always appeared whenever a certain stage of development was reached the result always had been the decay and breakdown of old institutions and the final exhaustion of the movement through its inability to produce new institutions adequate to the requirements of public order. The inevitableness of this attitude of thought at that period is indicated by Professor Sidgwick. He remarks that "in the middle of the eighteenth century an impartial continental observer," surveying the course of European history, "would probably have regarded monarchy of the type called absolute as the final form of government to which the long process of formation of orderly country-states had led up; and by which the task of establishing and maintaining a civilized political order had been, on the whole, successfully accomplished, after other modes of political construction had failed to realize it."³ Professor Sidgwick's judgment is borne out by the opinion of such a shrewd, cool observer as David Hume. In his time, England was a marked exception to the general prevalence of absolute rule, but, in an essay published in 1741, Hume argued that English constitutional limitations would not endure. He declared that "we shall at last, after many con-

³ *Development of European Polity*, p. 319.

vulsions and civil wars, find repose in absolute monarchy, which it would have been happier for us to have established peaceably from the beginning."⁴

Now, if we view political phenomena with the calm, naturalist scrutiny proper to scientific study, I think we must admit that eighteenth century opinion was abundantly warranted by the uniform testimony of history up to that period. Has there been any change since then to compel revision of that opinion? Has there been any advance in the evolution of political structure, supplying to democratic government an assurance of stability which it lacked before? I think there has been. If this be so the fact is of the greatest importance, for apprehension of it will give us the means of discerning the true cause of our own defects in democratic organization of public authority. What then is the new factor, which the Fathers could not include in their reckoning since it was not manifest in their time? It is the new basis to democratic government afforded by national monarchy, using the term with strict etymological significance as expressive of unity of executive authority.⁵ As Professor Sidgwick puts the case: "The unity which should be characteristic of an ordered state is most easily attained by placing it under the rule of that which is intrinsically and *per se* one."⁶ It is my impression that political science owes to Guizot the first clear exposition of the fact that modern monarchy is essentially a popular institution. The stages of the institutional process are most clearly described in Professor Sidgwick's "Development of European Polity," wherein he points out the divergence between the Teutonic country-state and the Greek city-state in the course taken by political evolution.

Thus, the hope of the democratic movement dating from the eighteenth century does not lie in the emotional force that impels it or in the diffusion of culture that accompanies it. There is nothing

⁴ Essays, Moral and Political.—Seventh essay.

⁵ Monarchy as a term of political science is not synonymous with royalty. In the opening paragraph of the third chapter of the *Decline and Fall of the Roman Empire*, Gibbon gives the proper definition. He says: "The obvious definition of a monarchy seems to be that of a state, in which a single person, by whatever name he may be distinguished, is entrusted with the execution of the laws, the management of the revenue, and the command of the army." John Adams correctly designated the United States as "a monarchical republic." Adams' *Works*, vol. vi, pp. 117, 118.

⁶ *Development of European Polity*, p. 327.

new in these characteristics. So far as they are concerned it is the same old story over again, told by Greece, and by Rome, and by mediæval Italy. But what is new is the conservancy that marks the modern democratic movement. The retention of old institutions, as the basis of popular rule, is, indeed, a new and hopeful characteristic. The work of the middle ages in developing national monarchy has produced an order of vertebrata in political zoölogy that really seems able to endure the stresses arising from rapid expansion of public consciousness and hence of evolving stable forms of democracy. Whereas, in ancient politics such stresses were disruptive, there are now political conditions in which they tend to increase of structure and enlargement of function without impairing the unity of the state, thus augmenting its capacity to adjust its arrangements to its needs. The nature of the process suggests that the democratic state when actually realized is the highest form of the state, for it is energized in all its parts and is thus capable of the greatest efficiency. And this is not merely a theoretical possibility. There is evidence, supplied in our own times, showing that marked success in establishing democratic rule has been actually attained by some peoples. The most illustrious administrative achievement that history records is the way in which truly democratic commonwealths have utilized advances in technology to give the common people cheaper and better service, instead of allowing the resultant economies to be absorbed in producing millionaires. But such commonwealths are able to secure these results by plenitude of authority that was originally collected by royal prerogative and that still preserves the ancient forms, although the authority has become wholly subject to democratic direction and control.

This then is what I have in mind in speaking of democratic government, namely, actual achievement in organizing public authority so that its power shall express the will of the people and its operations shall serve the welfare of the people. In that case, government will evince its democratic character by honest and efficient administration. The adage that by their fruits ye shall know them is the standard by which institutions are to be judged. All institutions are instrumental in their operation. They are not ends, but means to ends.

In adopting this concept of democratic government, we are advised by race experience in all ages that there are two conditions essential to its existence:

1. Consolidated power. Government can not be really democratic unless it is decisively superior to any other aggregation of power, whether it be that of a mob, a class, a corporation or a plutocratic conspiracy;—superior, not merely in theory, or spasmodically, but in the ordinary and regular exercise of its functions. The creation of such power, through the formation of appropriate political structure, has been the achievement of monarchical rule. The legal institutions of every civilized country bear witness to that fact.

2. Responsibility. To every exercise of power a definite responsibility should attach. Representative institutions have been the means by which this principle has been asserted. But representative institutions do not necessarily secure responsible government. The natural tendency, exhibited everywhere and always, so far as circumstances permit, is for those in the representative position to use their opportunities for themselves. Unless efficient means of counteracting this tendency are provided, representation becomes a scuffle of particular interests. Such means were provided as an incident of monarchical rule. It was as a check upon the irresponsible exertion of royal influence and as a method of solidifying the position of the Commons in defense of popular rights, that rules of order were adopted debarring members from offering any grant or aid to the Crown not expressly stipulated by responsible ministers. In this way was evolved the system which in all English commonwealths and in Switzerland makes it the right and duty of the administration to frame the budget and to prepare legislative measures for the consideration of the representative assembly. Never has the principle of responsibility been asserted by representative institutions save through such restraint upon the activity of individual motives and interests. The essential condition is that in practice the representative assembly shall be confined to the business of examining the criticizing governmental action, thus discharging the function of control in behalf of the people.

Viewed from this standpoint the political characteristics of American states are seen in their true nature. In their constitutional scheme they date back to the eighteenth century, a period anterior to the formation of the modern type of democratic government. The American people have never experienced democratic government. They do not know what it is and do not understand its requirements, so it has been possible to put them off with a base imitation. Neither the power nor the responsibility essential to

democratic government is established in the constitutional arrangements of American states. Therefore, the democratic tendencies that have developed since the eighteenth century, do not find in them appropriate organs of authority. The consequences are just such, in their general nature, as have appeared in all ages in similar conditions. The historic perversions of democracy—namely, oligarchy and ochlocracy—have manifested themselves in America quite as distinctly as in Greece, Rome and mediæval Italy. The resemblances that historians are now noting between ancient and modern bosses, grafters and spoilsmen rest upon substantial identities, affording a fine demonstration of the universal principle that like causes produce like effects, irrespective of the emotions and intentions with which the causes are set in operation. The cycle of change has followed the same order in all ages. As a remedy for abuses of power, partition of power is carried on, elective offices are multiplied, control passes to able men operating outside of the constitutional depositaries of power and those men use their influence to govern legislation and to exploit public resources for their own advantage. The general behavior of public men is determined by the conditions under which they act. When defect in behavior is systematic it invariably indicates defect in those conditions. But since concrete instances of defect in behavior generally appear as evidence of personal delinquency, it seems to be the case that the source of trouble is the personal character of the men who get into public office. Therefore, the efforts of reformers are directed to the conditions under which power is gained rather than to the conditions under which power is exercised. Hence the tendency is to elaborate electoral conditions, and in this way complications are introduced which in practice confer special advantage upon oligarchy because of its superior ability to command expert service and ample funds. The American state has entered on a fresh cycle of change in this respect. By reference to Professor Merriam's recent work on "Primary Elections," it will be found that the vagaries of ochlocracy there revealed emulate those of ancient Greece. If any one thinks that these political curios should be regarded as institutional forms of democracy let inquiry be made why it is that they have never appeared in genuine democratic government. The people of Switzerland, or New Zealand, or the Australian states do not trouble themselves about methods of nomination. They leave that matter to private initiative and expense. They reserve their concern for

the way representatives shall behave after the election and as regards that they fix conditions hard and fast, to establish responsibility both for what is done and what is not done.

To understand the sequence of cause and effect in considering the influence of state politics in expanding federal power, it is not necessary to discuss legal relations as such. The legalistic aspect is that which the situation presents to lawyers and judges, but the concern of students of political science is with the underlying influences which mold legal relations. In the tendencies towards aggrandizement of federal power now manifested in national legislation and in the decisions of the courts we may discern the operation of the historical principle that sovereignty unprovided for in extant forms of government always seeks to embody itself in new forms. That is the concise history of the Greek tyrant, the Roman princeps, the despot of mediæval Italy and the American boss. But the American situation is exceptional in that alongside of political structure and governmental function decomposing under the invasion of oligarchy and ochlocracy, there is political structure in which the predominant tendency is towards integration of structure and increased vigor of function. The framers of our national constitution, correctly interpreting the lessons of history, firmly established the principle of executive unity in the federal government. Thus a situation was created that curiously parallels, in reverse order, that which existed in Europe during the Middle Ages. Then the legalistic prepossessions were all originally on the side of imperial sovereignty. But the disintegration of the Holy Roman Empire emptied imperial sovereignty of real substance. The legalistic spirit, in seeking adequate foundations for its activity, turned to the real power exhibited by various states of the empire, and gradually built up the system of national monarchy upon which European civilization rests, and from which the modern democratic movement derives the institutional order that gives it efficiency. It has been just the other way round, in this country. With us, the states were the original depositaries of sovereignty. The federal government, in its incipency, was weak, precarious and infirm, but from the very first the influence of state politics tended to expand federal power. This is no speculative opinion. We have the express testimony of the Fathers that the incapacity of the states was the prime reason for adopting the instrument of government framed by the constitutional convention of 1787. That is the

argument which runs all through the Federalist. The same cause which led to the adoption of the national constitution has operated to aggrandize federal power ever since. The legalistic spirit turns instinctively to the federal government as the sole, competent organ of sovereignty in this country. Every resource of legal ingenuity is strained to bring rights and interests under federal jurisdiction.

Thus the influence of state politics in expanding federal power displays the operation of a historic principle of political biology. Our state politics exhibit the characteristic phenomena which occur with monotonous regularity in all ages, as republican forms of polity degenerate. They are all there—the growth of plutocratic privilege, the violence of demagogues, the infirmity of legislation, the decay of justice, the substitution of private vengeance for judicial process, the increase of crime and disorder, and the growth of associations formed for self-help in the redress of grievances, and resorting to night-riding, torture and assassination in furtherance of their purpose. All these details are familiar to students of history and in all ages the outcome has been the same—the establishing of some new basis of public order. In satisfaction of this fundamental human need, the legalistic spirit has accomplished, in past ages, prodigious tasks of invention. Starting with only such organization as was provided by the household arrangements of a Roman magnate, the legalistic spirit reared the majestic edifice of imperial administration and codified law. When imperial administration decayed, the legalistic spirit, starting with only such basis as was provided by feudal lordship, built up royal prerogative and established national monarchy. Is it at all wonderful then, as the American state sinks deeper and deeper in the mire of ochlocracy, that the legalistic spirit should turn to such a conveniently accessible refuge as federal authority? Here no task of invention is required of it. All that the legalistic spirit has to do is to construe existing law to meet political exigency. Its habitual inclination to do this very thing has become conspicuous in our jurisprudence. It acts without partiality. Federal authority showed itself signally incompetent in dealing with the race problem. The legalistic spirit has construed out of the Fourteenth and Fifteenth amendments the authority they were designed to confer upon Congress to maintain negro suffrage by appropriate legislation. State authority has shown itself signally incompetent in dealing with economic questions. The legalistic spirit has transferred to federal power control over currency supply; it is transferring to federal

power control over transportation rates and methods, and it seems disposed to transfer to federal power control over all corporations. And these things are only stages of a process of transfer that will eventually carry along with it all personal rights, unless the American state extricates itself from its present condition of inability to carry on honest and efficient government.

There are certain influences at work which appear as direct causes although they are really results of the general process of degeneracy that has been noted and as causes they have only secondary rank. Their operation is so conspicuous, however, that I am able to refer to casual speeches by our public men for details. One of these secondary causes is the habitual mendicancy of the states in their attitude towards the national government. What they can beg, they are unwilling to do for themselves. The Hon. James A. Tawney, Chairman of the House Committee on Appropriations, discussed this subject in a speech that was delivered on May 30, 1907, at Gettysburg, and was published in the Congressional Record for May 16, 1908. Another of these secondary causes was adverted to by Speaker Cannon, in his speech on Dec. 10th, before the recent Rivers and Harbors Congress that met in Washington. He related how Illinois had spent \$20,000,000 for railroads that were never built. As a result of similar incompetency our state constitutions generally contain provisions forbidding the use of public credit for public enterprises. The American state is unique in that the people not knowing how to control the government have reduced it to a condition of bare existence. America has created a form of polity the world has never seen before, in producing the manacled state,—the state that puts a strait-jacket and handcuffs upon government. And this at a time when there is an imperative social demand for extending the sphere of government and increasing its activities! For a penetrating discussion of the whole subject from the legalistic standpoint, the speech of Secretary Root may be consulted, that was delivered before the Pennsylvania Society in New York City, December 12, 1906.

It all comes to this, that the states are so corrupt and incapable that the people turn from them in disgust when they feel the need of government. To use one of Burke's pregnant sayings:—"It is not from impotence we are to expect the tasks of power." So long as this situation continues state politics will tend to expand federal power. At present, all the influences of state politics, particularly those issuing from the activity of reformers, are accelerating the process.